

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

AMANDA L. RICKS)	
Claimant)	
VS.)	
)	Docket No. 1,014,373
CATHOLIC CARE CENTER)	
Respondent)	
AND)	
)	
KANSAS ASSOCIATION OF HOMES FOR THE AGING INSURANCE GROUP)	
Insurance Carrier)	

ORDER

Respondent appeals the June 16, 2005 Award of Administrative Law Judge John D. Clark. Claimant was awarded benefits for a 13.5 percent impairment of function to her left leg for injuries suffered to her left knee on September 26, 2003. The Appeals Board (Board) heard oral argument on November 1, 2005.

APPEARANCES

Claimant appeared by her attorney, Joseph Seiwert of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, David L. Vogel of Topeka, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

ISSUES

1. Was claimant full-time or part-time for the purposes of computing claimant's average weekly wage?

2. What is the nature and extent of claimant's injury?
3. What amount of compensation is due?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant, a certified medical aide (CMA), began working for respondent in September of 2002. Claimant worked for respondent until September 26, 2003, when she had an accident at work, tripping over a wheelchair, and tearing ligaments and rupturing a tendon in her left knee. Claimant continued in her employment with respondent until November 3, 2003, at which time she was terminated from her job.

After the injury, claimant was referred to Dr. Wilkinson, who ordered x-rays, physical therapy and an MRI of the left knee. The MRI indicated mild effusion of the left knee, but, as noted by Kenneth A. Jansson, M.D., board certified orthopedic surgeon, the MRI was otherwise normal. Dr. Jansson first became claimant's treating physician on December 3, 2003. Shortly thereafter, he determined that claimant should undergo an arthroscopy for what he considered to be a torn meniscus and chondromalacia or damage to the cartilage to the back of claimant's kneecap. The arthroscopy was performed on December 16, 2003, with a partial medial meniscectomy and a lateral release performed. Claimant was last seen in Dr. Jansson's office on February 4, 2004, at which time claimant was doing well, with no complaints. Dr. Jansson gave claimant a release with no restrictions, feeling she was at maximum medical improvement, and assessed claimant a 2 percent impairment to the left lower extremity. It was noted during Dr. Jansson's deposition that, while he performed the surgery on December 16, 2003, when claimant, subsequent to that surgery, was in his office on January 7, 2004, and February 4, 2004, the office notes were prepared by Jamie Ralph, Dr. Jansson's physician's assistant. This would indicate that after the surgery, Dr. Jansson did not see claimant. Dr. Jansson acknowledged he was not certain if he actually saw claimant on those dates or whether it was his physician's assistant.

Claimant was referred for an evaluation by Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation. The referral, at the request of claimant's attorney, resulted in an examination on May 12, 2004. Dr. Murati, after reviewing the MRI of the left knee (which did indicate mild effusion), found claimant to be status post partial medial meniscectomy, lateral release, fat pad resection, suprapatellar plica resection and a left

patellofemoral syndrome. Dr. Murati assessed claimant a 23 percent impairment of the left lower extremity based upon the fourth edition of the *AMA Guides*.¹

Due to the conflict regarding what, if any, impairment claimant suffered as a result of her injuries, claimant was referred to George G. Fluter, M.D., of Advanced Anesthesia Associates & Pain Management, for an examination. This referral, pursuant to the Order of the ALJ, resulted in an examination of claimant on September 20, 2004. Dr. Fluter diagnosed claimant (1) status post left knee diagnostic arthroscopy with partial medial meniscectomy, fat pad resection, suprapatellar plica resection, and lateral release; (2) ruptured ligamentum mucosum; suprapatellar plica; medial meniscal compression tear; tight lateral retinacular structures; and (3) mild ligamentous laxity of the left knee. Dr. Fluter assessed claimant a 25 percent impairment to the left lower extremity pursuant to the fourth edition of the *AMA Guides*² for the injuries suffered on September 26, 2003.

The ALJ, in reviewing the medical evidence, found claimant to have suffered a 13.5 percent impairment to the left lower extremity after averaging the highest and the lowest ratings.

At the time of her injury, claimant was earning \$10.35 per hour and was a full-time employee. Claimant testified she was hired as a full-time employee, expected to work 40 hours a week, although, later, she acknowledged that the hours she was being provided by respondent were somewhat reduced when a new director of nursing was hired. Claimant testified that this reduction in hours occurred between June and September of 2003. Claimant did not request the reduction in hours.

Respondent deposed Gayla Jarboe, respondent's human resources director. Ms. Jarboe was not employed with respondent when claimant worked there, but did have records associated with claimant's employment. She acknowledged claimant was earning \$10.35 per hour at the time of her accident and that claimant was being provided fringe benefits as though she were a full-time employee. However, Ms. Jarboe placed into evidence claimant's pay records beginning in December of 2002, which indicated that claimant was not working 40 hours a week and was, instead, only averaging approximately 17 hours a week during the 26 weeks leading up to her accident. Ms. Jarboe also testified that at the time of claimant's injury, a full-time employee, pursuant to this employer's policy, was one who worked 64 hours during a two-week period.³

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

² *AMA Guides* (4th ed.).

³ Jarboe Depo. at 10.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.⁴ As claimant's injury is limited to her left lower extremity, it is controlled by K.S.A. 44-510d, the "scheduled injury" statute. K.S.A. 44-510d states in part,

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

In this case, the ALJ split the ratings between the high of 25 percent found by Dr. Fluter, the independent medical examining doctor, and the low of 2 percent found by Dr. Jansson, the treater. However, the 2 percent rating provided by Dr. Jansson, while it is his opinion, is not pursuant to any version of the *AMA Guides*, as is required by K.S.A. 44-510d. Neither Dr. Jansson's report nor his deposition makes mention of the fourth edition of the *AMA Guides*, as is required by statute. Therefore, the Board cannot consider Dr. Jansson's 2 percent impairment, as it is in violation of the legislative mandate.

With regard to the 23 percent impairment by Dr. Murati and the 25 percent impairment by Dr. Fluter (the independent medical examining doctor), the Board finds Dr. Fluter's opinion to be the more credible. As an independent medical examiner, Dr. Fluter is determined to be less biased than a hired expert testifying on behalf of one party or the other. The Board, therefore, finds, that claimant has suffered a 25 percent impairment to the left lower extremity for the injuries suffered on September 26, 2003.

K.S.A. 2003 Supp. 44-511, when determining an employee's average weekly wage where an employee's money rate is fixed by the hour, states that if an employee is a full-time hourly employee, the average gross weekly wage shall be determined by multiplying the straight-time hourly rate at the time of the accident by the customary number of hours constituting an ordinary day,

. . . but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; . . .⁵

Claimant testified, in this instance, that she was hired as a full-time hourly employee to work 40 hours per week and did, on occasion, work 40 hours a week. Claimant acknowledged that her hours began to reduce, although, according to her testimony, this

⁴ K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

⁵ K.S.A. 2003 Supp. 44-511(b)(4)(B)(ii).

hourly reduction did not occur until June or July of 2003,⁶ or sometime between June and September of 2003.⁷ Claimant testified, however, that there were times during this period when she worked 32 to 40 hours a week.

Ms. Jarboe, respondent's representative, testified that claimant's hours were significantly lower than those testified to by claimant, but acknowledged that claimant was receiving fringe benefits on the same level as a full-time employee. The Board finds pursuant to K.S.A. 2003 Supp. 44-511, that claimant was a full-time employee at the time of the accident and claimant's average weekly wage will be computed by multiplying \$10.35 per hour times the statutory mandate of 40 hours per week, which, when combined with claimant's fringe benefits, results in an average weekly wage of \$464.05, as was utilized by the ALJ. The Board, therefore, modifies the Award of ALJ to award claimant a 25 percent impairment to the left lower extremity, but affirms the average weekly wage utilized by the ALJ.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated June 16, 2005, should be, and is hereby, modified and an award is granted in favor of the claimant, Amanda L. Ricks, and against the respondent, Catholic Care Center, and its insurance carrier, Kansas Association of Homes for the Aging Insurance Group, for an accidental sustained on September 26, 2003, and based upon an average weekly wage of \$464.05.

Claimant is entitled to 7.28 weeks of temporary total disability compensation at the rate of \$309.38 per week totaling \$2,252.29, followed by 48.18 weeks of permanent partial general disability compensation at the rate of \$309.38 per week totaling \$14,905.93, for a total award of \$17,158.22.

As of the date of this award, the entire amount would be due and owing and ordered paid in one lump sum minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

⁶ R.H. Trans. at 11.

⁷ R.H. Trans. at 15.

Dated this ____ day of December, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority. Claimant testified that she was a full-time employee for respondent, working up to 40 hours per week. However, the evidence in the record does not support claimant's testimony. The records provided by respondent's human resources director Gayla Jarboe indicate claimant was averaging only slightly over 17 hours per week. Even though claimant testified her hourly reduction did not occur until between June and September of 2003, the records beginning in December of 2002 contradict claimant. It is clear from those records that claimant did not work 40 hours a week on a regular basis and, in fact, according to those records, rarely, if ever, worked a 40-hour week, averaging substantially less.

K.S.A. 2003 Supp. 44-511 states, in part, that 40 hours shall constitute the minimum hours for computing the wages of a full-time hourly employee "unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern;"⁸

In this instance, Ms. Jarboe testified that at the time of claimant's accident, respondent's normal and customary workweek for a full-time employee was 64 hours over a two-week period. Pursuant to K.S.A. 2003 Supp. 44-511, at the very most, claimant's average weekly wage should be based upon a 32-hour-per-week average at \$10.35 per hour.

This Board Member further disputes whether claimant was a full-time employee, working only 17 hours a week on the average over a many-month period.

⁸ K.S.A. 2003 Supp. 44-511(b)(4)(B)(ii).

This Board Member acknowledges that respondent's records listed claimant as full-time and provided her fringe benefits as though she were a full-time employee. However, based upon this record, this Board Member would find that claimant was either a part-time employee pursuant to K.S.A. 2003 Supp. 44-511 or, at the very most, was a full-time employee, expected to work 32 hours per week. This Board Member would, therefore, modify claimant's average weekly wage accordingly.

BOARD MEMBER

- c: Joseph Seiwert, Attorney for Claimant
 David L. Vogel, Attorney for Respondent and its Insurance Carrier
 John D. Clark, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director